the wound below the elbow was clearly more consistent with the plaintiff being a back-seat passenger resting his elbow on the window, not anticipating any accident. If he was indeed driving as alleged, then he was plainly negligent by attempting to steer only with one hand around a bend. Having seen the lorry approach in the manner described, he could have had both hands on the steering wheel, not only to ensure better control of the car, but also to save his elbow from any possible contact with the lorry. Fifthly, that the gash wound could not have resulted from a mere fall on the grass fortifies further my belief that his story was wholly untrue. Such being the result, the claim naturally must fail as it did.

Only one other point in the evidence requires brief mention in connection with the second main ground of appeal. It was argued that the evidence given by Shanmugam, the taxi driver, of having observed a trail of water on the right side of the white middle line of the road, facing Malacca was evidence of the lorry encroaching on the wrong side. The judge did not consider the fact sufficiently material and, with respect, I agree. The evidence was vague and says nothing about the trail being merely an inch or a yard to the right of the middle line. In the latter case it might have been relevant. In the former, however, the usual camber of the road along a curve might well have caused the water from melting ice to drop over the side of the lorry without that vehicle necessarily being over the middle line. *Ong Yam Chong* v. *Chan Wah* [1] was cited by appellant's counsel as authority for the proposition that, where the court was unable to say which of two parties was more to blame, they must be held both to blame and equally to blame, following certain *dicta* in *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* [2] I think I should point out that in *Ong Yam Chong's* case I held that "both drivers were clearly road-hogs" and hence both were at fault. The warning there uttered by Thomson C.J. (as he then was), if heeded, should enable advocates to see *Baker's* case and *France* v. *Parkinson* [3] in their proper perspective.

I would dismiss this appeal with costs.

Barakbah L.P. concurred.

Ismail Khan J.: I have had the benefit of reading the judgment of Ong F.J. with which I entirely agree and have nothing to add.

Appeal dismissed.

Solicitors: *Donaldson & Burkinshaw; Braddell & Ramani.*

LIM SOH MENG & ANOR. v. KRISHNAN

[F.C. (Barakbah L.P., Ong Hock Thye F.J. and Ismail Khan J.) July 12, 1966]

[K.L. — Federal Court Civil Appeal No. X 10 of 1966]

Road accident — Inferences drawn by trial judge — Whether appellate court can differ from trial judge — Onus of proof.

Damages — Running-down action.

Practice and Procedure — Inference — Story of plaintiff and defendant equally disbelieved — Onus.

This was a claim for damages in a running-down action. The learned trial judge rejected the evidence of the plaintiff and that of the defendant but went on to say "In my judgment the real reason for the second defendant to swerve his car to the right was to avoid the schoolchildren who must have suddenly started crossing the road from the left in order to enter the estate road from a point almost directly opposite the road. The second defendant therefore must have swerved to his right before he came abreast of the estate road. He must have swerved almost to the other edge of the road and having thus avoided the children, he must have started swerving slightly back to the left when his car hit the plaintiff from directly in front. The plaintiff may not have been riding his bicycle along the edge of the road. He may have been within two or three feet of the edge of the road when he was hit and when he was hit the car was coming to his left". He gave judgment for the plaintiff.

Held: (1) where as in this case the story of the plaintiff and of the defendant has been equally disbelieved, the learned trial judge should have decided the case on the onus of proof;

(2) the inferences drawn by the learned trial judge were not supported by the facts and therefore the appeal must be allowed.

Case referred to:—

(1) *Robins* v. *National Trust Co.* [1927] A.C. 515, 520.

FEDERAL COURT.

N. A. Marjoribanks for the appellants.

S. Kulasegaram for the respondents.

Cur. Adv. Vult.

Ong Hock Thye F.J.: This is an appeal by the defendants against a judgment of the High Court in Kuala Lumpur awarding damages to the plaintiff in a running-down action.

The plaintiff was a labourer employed by the Banting Town Board. His daily work was as a scavenger from 3 a.m. to 6 a.m., and after a two-hour break, he would resume his labours cleaning the toilets in the market from 8 a.m. to 1 p.m. On January 21, 1963 he was returning home by bicycle after the day's work when he collided with a motor-car owned by the first defendant which was driven by the second defendant. As a result of the accident he suffered a severely crushed left hand and a crush injury to the shoulder, almost paralysing his right arm. The writ was issued on August 26, 1963; the hearing occupied two days, exactly two years later and judgment was delivered by Gill J. on February 4, 1966 in favour of the plaintiff.

The plaintiff in his statement of claim

alleged that he was cycling along his own side of the road along Jalan Dengkil, when the defendant's motor-car approaching from the opposite direction ran into him. The particulars of negligence alleged that the driver (a) drove too fast; (b) failed to keep a proper look-out; (c) failed to give sufficient warning of his approach; (d) applied his brakes to avoid school children crossing the road and thereby lost control of the car and knocked the plaintiff who was on the right (i.e. his own) side of the road.

Eyewitness accounts were given by the plaintiff and a gardener, Ponnusamy, on the one hand and by the second defendant alone on the other. According to the plaintiff, as he was riding along the left of Dengkil road, about 2½ miles from Banting, he came up to five schoolchildren walking ahead of him in single file in the same direction and on the same side of the road. All of a sudden they crossed the road to go into an estate to which there was an access road on the opposite side. "At that time" he continued, "I saw a car coming from the opposite direction. The car was travelling on its left side of the road. The driver of the car swerved the car to the right in order to avoid knocking the children. In doing so he came to my side of the road and knocked me." The plaintiff explained that his home was a half-mile further on and so he himself had no reason to cross the road.

In cross-examination he stated that, just before the accident, he was cycling about 3 feet from the grass verge on his left and the children were about 6 to 8 feet in front when they began to cross the road. "They walked across the road. The car was then about 25 feet away . . . It was after the children started crossing the road that the car swerved to its right. It was travelling fast. It was coming very fast. The road was straight. It was a bright sunny day and (*sic*) I could not see very far ahead." The last statement naturally started a line of questioning as to the range of his vision and his alertness, to which he answered, "That morning I worked from 3 a.m. to 6 a.m. and then from 8 a.m. to 1 p.m. I was tired a bit, but not very tired. It was hot. I was not half-asleep as I was riding home. I was awake as I was cycling. *On a hot day my eyes would water and I would not be able to see far.*"

The plaintiff's witness, Ponnusamy, said he was on the same stretch of road at the relevant time but cycling in the opposite direction to the plaintiff, who was riding on his own left side of the road. He went on: "Before I passed him a car came driving very fast from behind me . . . The car passed me. Then I saw the car knock the cyclist . . . The car pulled up on the left side of the road and stopped after knocking down the cyclist in front of me. I did not see any schoolchildren on the road at the time." In answer to a question by the court, Ponnusamy said that the plaintiff was then about 40 feet away from himself — this distance being indicated in court.

The second defendant had made a report at Telok Dato Police Station less than an hour after the accident, in which he stated: "I saw a male Indian riding a bicycle coming from Banting cut across the road to the left intending to go into the estate. When he had cut across the road he came back to the road. Although I applied my brakes to swerve to the right I found that I still knocked into the Indian." In his evidence this defendant somewhat elaborated on the details. He said he could see a long way ahead and was on his own side of the road, going at 40 miles per hour, when he saw the plaintiff on his bicycle and children on the same side of the road. On the opposite side the road was clear. As he approached to about three chains from the cyclist the latter suddenly swerved across the road and after reaching the other side rode along that side until car and bicycle were about 100 feet apart when the cyclist swerved back to his left. As a result of this manoeuvre he could not avoid the collision, although he had applied the brakes immediately on sensing danger. He had swerved towards the right to dodge the cyclist and then back to the left to avoid running into the children who were walking on the grass by the side of the road. Under cross-examination he denied that he had run into plaintiff because he was trying to avoid the children who were then crossing the road. The children, he asserted, were not attempting to cross the road at all.

Apart from the conflicting accounts above stated, there were what might be described as various items of neutral evidence consisting of the sketch plan, showing tyre marks of the car, the position of blood-stains on the road and of the bicycle and its headlamp; there were also photographs of the motor-car and bicycle taken at the scene. The bicycle was produced in court and examined by the learned trial judge. Consideration of such evidence led the judge to deduce and find — in my view rightly — that the damage to the bicycle showed "that it was hit from directly in front and not from the side". This fact, together with the position of the blood-stains, the bicycle and headlamp led the judge to conclude — again rightly in my opinion — "that the plaintiff's story that he was riding along the left side of the road when he was knocked down cannot be true."

Having taken this view of the plaintiff's story, the judge found it difficult, on the other hand, to accept that of the defendant driver, either as stated in the police report or in his evidence, on account of the discrepancy between the report and evidence. He also considered the

evidence of Ponnusamy unreliable on the ground that he had not observed the children whom he should not have failed to see. The judge found as a fact that there were children at the scene as alleged by both the plaintiff and second defendant.

In the result the judge, having decided that the plaintiff's story could not be true and that the positions of the bloodstains and the bicycle "would appear not to support the plaintiff's story", must be taken to hold that the plaintiff had failed to discharge the onus which lay on him to prove negligence on the part of the defendant in a manner pleaded in his statement of claim. Nevertheless, he went on to say "In my judgment, the real reason for the second defendant to swerve his car to the right was to avoid the schoolchildren who *must* have suddenly started crossing the road from the left in order to enter the estate road from a point almost directly opposite the road. The second defendant, therefore, *must* have swerved to his right before he came abreast of the estate road. He *must* have swerved almost to the other edge of the road and, having thus avoided the children, he *must* have started swerving slightly back to the left when his car hit the plaintiff from directly in front. The plaintiff may not have been riding his bicycle along the edge of the road. He may have been within two or three feet of the edge of the road when he was hit and when he was hit the car was moving to his left."

With the greatest respect, I do not think that the judge should have indulged in speculation as to what might in fact have happened, after having rejected the plaintiff's story. His theory hinged on the behaviour of the children and postulated that the children "*must* have suddenly started to cross the road". Surely such an inference should have been tested by other accepted evidence, negative as well as positive, before such a hypothesis was accepted. For my own part, I should have regarded the inferences as contrary to the evidence. True, the plaintiff did say so of the children. But his witness, Ponnusamy, did not. Having to explain the blind spot in Ponnusamy's eye, the judge said, "There is of course a possibility that the plaintiff's witness paid no attention to the children or that they had crossed the road and entered an estate road *before the accident took place*". The second alternative is, I think, manifestly out of the question because, in that event, they could not possibly have influenced the course of the car so as to lead to the accident. The first alternative is equally untenable because, if the distance between the plaintiff and Ponnusamy was about 40 feet, as the latter alleged, when the accident happened, then the shockingly reckless and dangerous behaviour of the children as close as, perhaps, 60 to 80 feet ahead, must inevitably have made an indelible impression on his mind. In fact, however, Ponnusamy flatly contradicted the plaintiff and corroborated the second defendant's evidence. Merely because he failed to notice the children — and there is a perfectly reasonable explanation if, in fact, the children's behaviour in no way contributed to the accident — is no ground for rejecting the testimony of this witness who, except on this point, was not regarded as otherwise than entirely truthful.

To test the truth of the plaintiff's story, it is sufficient to recall that he said the children were walking in single file about 6 to 8 feet ahead of him (which distance, let it be conceded, should be that of the nearest child); "they *walked* across the road (not 'ran'); the car was then about 25 feet away . . . It was *after* the children *started* crossing the road that the car swerved to its right. It was travelling fast. It was coming very fast." Even assuming that the plaintiff, a simple labourer, erred in his judgment of distances, and the same is multiplied fourfold, I have not the least hesitation in saying that, had the children started walking across the 17½-feet highway, even as much as 100 feet ahead, into the path of an oncoming car travelling at 40 miles per hour, the result would have been tragic.

Since I find myself compelled to differ from the learned trial judge on his finding as a question of fact I should, of course, state my reasons in full. In addition to what I have already discussed I shall mention the other relevant reasons briefly. First, the road was only 17½ feet wide. A "swerve", when that word is used, must not be taken too literally. On a narrow road, moving 2 or 3 feet off the centre-line is all that can be done safely when travelling at 40 miles per hour. The evidence of the second defendant must be regarded in that light. If, subject to this qualification, this defendant said he swerved, in this direction or that, on seeing the wavering course of the cyclist, he was only doing exactly what a reasonable considerate driver should have done in the circumstances. Secondly, the fact that the bicycle was "hit from directly in front and not from the side" did not necessarily imply that the bicycle or the car or both must have been crossing the road at almost right angles from side to side. All that was required for a frontal collision was for the plaintiff to have taken a wavering course two or three feet from the course he was following (he having admitted that he was riding about 3 feet from the left grass verge) and it would have sufficed to convey the impression that he intended to cross the road, thereby causing the defendant to take evasive action. Thus when the cyclist came to realise that there was an oncoming car, it was already too late to get back close to the side of the road. A drowsy, tired cyclist, who had been awake since 3 a.m., might on a hot day have meandered across the road in a moment of inattention. It

is to be noted that he admitted he was not aware of the approaching car until it was very close by, though he could not have failed to see it had he been looking ahead. That explanation seems to me at any rate the more logical and reasonable, although it is unnecessary for the court to indulge in any speculation after the plaintiff had failed to discharge the onus which lay on him. Thirdly, I do not think there was any or sufficient evidence on the record to justify the inference that the plaintiff was two or three feet from his own side of the road when he was knocked down, especially after it had been held as a fact that his "story that he was riding along the left side of the road when he was knocked down cannot be true." Fourthly, the positive evidence of the second defendant and of the plaintiff's own witness Ponnusamy — not to mention the failure on the part of the plaintiff to produce any of the children or call any evidence showing that some of them at least lived on the estate across the road — should have outweighed the evidence of the plaintiff alone regarding their dangerous behaviour.

Last and by no means the least, in a case like this, where both the plaintiff's and the defendants' story had been equally disbelieved, I think the principle enunciated in *Robins* v. *National Trust Co.*[1] should have been applied. There it was said by Lord Dunedin as follows:

> "Now, in conducting an inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter".

Here there was no preponderence of evidence on either side.

Much as I regret the necessity, and much as I sympathise with the plaintiff upon his misfortune, I have no alternative but to allow the appeal with costs.

Barakbah L.P. concurred.

Ismail Khan J.: I have had the benefit of reading the judgment of Ong F.J. with which I am in entire agreement and have nothing to add.

Appeal allowed.

Solicitors: *Lovelace & Hastings; Athinahappan & Co.*

COMPTROLLER OF INCOME TAX v. A.B. AND COMPTROLLER OF INCOME TAX v. C.D. LTD.

[O.C.J. (Ong Hock Thye F.J.) July 15, 1966]

[K.L. — Civil Suits Nos. 1203 of 1964 and 46 of 1965]

Income Tax — Assessments — Notices — Whether Comptroller has to give particulars of sources of income — Powers of Comptroller — Income Tax Ordinance, 1947, ss. 73(2), 82, 86(3), and 91(2).

In these cases which were heard together the Comptroller of Income Tax applied to enter final judgment on a claim for income tax and penalty. In the first case the taxpayer had failed to submit his returns and assessments were therefore made by the comptroller. A certificate had been issued by the comptroller setting out the amount of tax due. In the second case, the comptroller had refused to accept the defendant's returns and had made his own assessment. It was argued by the defendant (a) that the notices of assessments did not comply with the proviso to section 73(2) of the Income Tax Ordinance, in that it did not give the sources of the income of the taxpayer; (b) that section 82 of the Ordinance conferred on the comptroller unlimited powers of assessment which he could exercise arbitrarily; (c) that the comptroller had no power to impose a penalty in the second case, as the question of the correctness of the returns had not been tested in court.

Held: (1) the comptroller had sufficiently complied with the requirements of section 73(2) of the Income Tax Ordinance by showing the chargeable income and the tax payable thereon;

(2) the comptroller had legally exercised his powers under section 82 of the Income Tax Ordinance and the certificate issued under section 86(3) of the Ordinance sufficed, on the facts of this case, for judgment to be given against both the defendants;

(3) section 91(2) of the Income Tax Ordinance gave the comptroller power to impose a penalty on the taxpayer for an incorrect return unless he satisfied the comptroller that the omission, understatement or incorrect information was made or given in good faith; and in this case the comptroller was within his rights in imposing the penalty.

Case referred to:—

(1) *A.B.C.* v. *The Comptroller of Income Tax, Singapore* [1959] M.L.J. 162, 166.

CIVIL SUIT.

Au Ah Wah (Treasury Solicitor) for the plaintiff.

K. Raja Nayagam for the defendants.

Cur. Adv. Vult.

Ong Hock Thye F.J.: By agreement of the Treasury Solicitor, appearing for the Comptroller of Income Tax, and counsel for the defendants, these two cases were heard together. There was, of course, a nexus between them. *BC*, the defendant in Civil Suit No. 1203 of 1964, admits in his defence that he had been sole proprietor of the business which was incorporated in April 1962 and thereafter became known as *C.D.* Ltd., the defendant in Civil Suit No. 46 of 1965.

In each case the plaintiffs' claim, by specially indorsed writ, is for income tax and penalty, pursuant to section 86(1) of the Income Tax Ordinance, 1947. In Civil Suit No. 1203 of 1964 the plaintiff duly applied by summons under R.S.C. Order 14, rule 2, to the senior assistant registrar for leave to sign final judgment and the same was entered, after hearing argument by counsel, on March 25, 1965. Notice of appeal to the judge was filed on March 27, 1965. By reason thereof, the plaintiff on April 2, 1965 took